

United States Courts  
Southern District of Texas  
FILED

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JAN 10 2003

**Michael N. Milby, Clerk**

§ 100.00

## CLASS ACTION

VS.

THE REGENTS OF THE UNIVERSITY  
OF CALIFORNIA, et al., Individually and  
On Behalf of All Others Similarly Situated,  
Plaintiffs,

**VS.**

KENNETH L. LAY, *et al.*  
Defendants.

TO THE HONORABLE MELINDA HARMON, UNITED STATES DISTRICT JUDGE:

Now comes DOW JONES & CO., INC., THE NEW YORK TIMES CO., THE WASHINGTON POST, USA TODAY, THE HOUSTON CHRONICLE, ABC, INC., and THE REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS, and files this Response to Enron's Motion for Confidentiality Order setting out, for the benefit of the Court, the Media Intervenor's position regarding Enron's motion. In short, the Court should deny Enron's request for a ninety (90) day blanket protective order—Enron has had plenty of notice and time to

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identify documents it wants to claim are confidential to produce. The Court should deny any protective order other than the Court's General Order 2002-9 on the materials that Enron has previously produced to state and federal governmental bodies, and the Court should provide for very narrow protection for other documents to be produced.

# **I.** **SHORT HISTORY ON THE DOCUMENT DEPOSITORY**

It bears recalling that in its February 27, 2002, Scheduling Order (Docket No. 326) this Court ordered the creation of a Document Depository and Enron's production into that depository of Enron documents and transcripts produced or given pursuant to government inquiries on Enron's handling of ERISA-governed pension plans. The documents were to be produced by April 1, 2002. On April 10, 2002 (Docket No. 448) the Court entered an order agreed to by Enron and the lead Plaintiffs allowing the deposit of the documents on April 8, 2002, and ordering Enron, by April 26, 2002 (18 days later and over 230 days before the Court's December 18, 2002, order denying a blanket protective order) to "determine and designate by Bates number those documents produced on April 8, 2002, which contain information regarding individual participants in the ERISA-governed benefit plans which should be treated as confidential . . . ." Any privileged document inadvertently produced on April 8, 2002, was to be returned on demand.

Then, on August 15, 2002 (over 120 days before the Court's December 18 Order) the Court ordered Enron to produce "all documents and materials produced by the Debtor related to any inquiry or investigation by any legislative branch committee, the executive branch, including the Department of Justice and the Securities and Exchange Commission, and all transcripts of witness interviews or depositions related to those inquiries." The Court agreed in that order that "Enron has already found, reviewed, and organized the documents." August 15, 2002 Order

(Docket No. 1008). Although not explicitly stated, this production was presumably required to be made under the Court's General Order 2002-9 entered on July 22, 2002.

On September 23, 2002 (over 80 days before the Court's December 18, 2002 order) the Lead Plaintiff filed their motion to preclude the entry of any confidentiality order. Enron was thus on notice of the likelihood that it would have to specifically identify any basis for confidentiality of documents and could not simply rely on the Plaintiffs' agreement to keep documents confidential.

On October 30, 2002 (49 days before the December 18, 2002 Order) the Court signed the "Order Establishing Document Depository" (Docket No. 1116) which provided for identification and basic coding of the documents upon their deposit into the Document Depository and further making it clear that before documents were deposited into the Document Depository they should be marked in accordance with the Court's General Order No. 2002-9.

This history shows that Enron has been on notice that it would have to identify those documents it considers confidential by Bates number and comply with the Court's General Order 2002-9. The Court even found, in its August 15 Order, that certain documents were already identified and organized. There is no basis or excuse for Enron's claim now that it has not already typed, catalogued, and redacted the documents the Court has already ordered it to produce.<sup>1</sup>

## **II. ENRON'S MOTION IS SIMPLY A REPLAY OF PREVIOUS FILINGS TO WHICH THE MEDIA INTERVENORS HAVE ALREADY RESPONDED**

Enron's motion for confidentiality order is largely a repeat of its response to Lead Plaintiff's original motion to preclude any confidentiality order (Docket No. 1076). Enron's new

pleading does not identify specific documents by Bates number. It adds little, if anything, to the arguments Enron previously made. The Media Intervenor's dealt with those arguments in their original brief (Docket No. 1110) and in their Reply Brief (Docket No. 1166). Rather than burden the record by repeating those responses here, the Media Intervenor's refer the Court to its previous pleadings noted above that set out the Media Intervenor's' positions.

### **CONCLUSION**

The documents that Enron has already produced and deposited in the Document Depository pursuant to the Court's February 27, 2002, order and its August 15, 2002, order should be subject to no confidentiality provision and should be releasable to third parties by any party to this action.

If the Court, with regard to other documents or depositions to be produced, determines to enter some form of protective order, any such order should be very limited along the narrow lines discussed at pp. 11-12 of the Media Intervenor's' Reply Brief (Docket No. 1166).

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<sup>1</sup> As noted in the Media Intervenor's' Brief in Support of Motion to Intervene and on Protective Order and Access Issues (Docket No. 1110), Enron has also produced such documents to Dynegy in another lawsuit. *See* 9, footnote 1.

Respectfully Submitted,



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### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEDIA INTERVENORS' RESPONSE TO ENRON'S MOTION FOR CONFIDENTIALITY ORDER OF DOW JONES & CO., INC., THE NEW YORK TIMES CO., THE WASHINGTON POST, USA TODAY, THE HOUSTON CHRONICLE, ABC, INC., and THE REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS, has been served by sending a copy via electronic mail to [serve@esl3624.com](mailto:serve@esl3624.com) on the 9<sup>th</sup> day of January 2003.



David H. Donaldson, Jr.

James A. Hemphill

## SUPPLEMENTAL CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEDIA INTERVENORS' RESPONSE TO ENRON'S MOTION FOR CONFIDENTIALITY ORDER OF DOW JONES & CO., INC., THE NEW YORK TIMES CO., THE WASHINGTON POST, USA TODAY, THE HOUSTON CHRONICLE, ABC, INC., AND THE REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS has been served by via UPS on the following parties who do not accept service by electronic mail on the 9<sup>th</sup> day of January, 2003.

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